IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1662 of 1996

with

CIVIL REVISION APPLICATION No 1690 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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RAJESH JAYKRASHNA

Versus

JASUBHAI JIVANLAL

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Appearance:

1. Civil Revision Application No. 1662 of 1996
   MR KV SHELAT for Petitioner No. 1
   MR JF MEHTA for Petitioner No. 1
   DAKSHESH MEHTA for Respondent No. 1-5
   MR DH CHUDASAMA for Respondent No. 1
   NOTICE SERVED BY DS for Respondent No. 6
   SERVED BY RPAD - (N) for Respondent No. 7-8
   Mr. K.M.Parikh, ASSTT. Government Pleader
   for Respondent No. 9
   RULE SERVED BY DS for Respondent No. 10
2. Civil Revision Application No. 1690 of 1996
   MR KV SHELAT for Petitioner No. 1

DAKSHESH MEHTA for Respondent No. 1
Mr. K.M.Parikh, Asstt. Government Pleader
for respondent no. 8.

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CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 05/07/2001

ORAL JUDGEMENT

These Revision Applications have been filed against a common order dated 25th September, 1996 passed below exh. 1 in Regular Execution petition no. 49 of 1995 by the 2nd Joint Civil Judge (S.D.), Ahmedabad (Rural), Ahmedabad. Therefore, both these Revision Applications are being disposed of by this common judgment. Regular Civil suit no. 212 of 1993 was filed by the respondents-original plaintiffs for a declaration and possession of the right of way on the plots of the petitioners. The suit was decreed on 29th February, 1992. The petitioners filed First Appeal nos. 27 of 1992 and 33 of 1992 before District Court, Ahmedabad (Rural) and those appeals were dismissed. Thereafter, Second Appeal Nos. 14 of 1995 and 86 of 1995 were filed in this Court against the judgment and decree of the trial court confirmed by the lower appellate court. Second Appeal no.14 of 1995 was dismissed on 8.3.1995 by this Court, while Second Appeal no. 86 of 1995 was dismissed on 1st August, 1995. After confirmation by this Court of the decree passed by the trial court, it was put in execution by Regular Execution petition no. 11 of 1995. That Execution petition was disposed of by the impugned order dated 25th September, 1996 wherein Court commissioner was ordered to be appointed and was directed to demolish the wall constructed over survey no. 1050 towards western side and going to Ambli road as the same is constructed on the way of the decree holder and to get open the way and the Court commissioner was further directed to remove the gate which was installed by the judgment debtor (defendant nos. 1 and 2) on the said road and to get the way of the plaintiff as an open way. The court commissioner was further directed to note the trees in number which were standing on the said plot as obstructions, hindrances and barricade. The decree holder was directed to move the authority concerned to remove the electric poles and telephone poles standing on the way.

2. Heard the learned counsel for the parties and perused the relevant papers on record. After filing

of the execution application, notices were issued to the defendants-judgment debtors. The defendant no.1 filed reply at exh. 34. It is stated that the decree is not executable as survey no. 1050 is not at present situated at the place and it is converted into survey nos. 1050/1/A, 1050/1/B and 1050/1C and it is not clear in the decree as to from which party, the way was granted to the respondent. The decree is ambiguous and not executable. The survey no. 1043 belongs to opponent no.1 who purchased the land in survey no. 703 and survey no.138 for its way to reach to Ambli road and this way is belonging to petitioner-opponent no.1. The defendant no. 3-petitioner also filed his reply vide exh. 41 wherein it is stated that the decree cannot be executed and is not tenable as decree was obtained by fraud by the plaintiffs of the original suit. Hence, the decree obtained by fraud cannot be executed at all. The petitioner has admitted that Regular Civil suit no. 212 of 1983 was already decided by the trial court and an appeal was also filed against the judgment of that suit. Then the petitioner came to know that in the trial court, the plaintiff has examined one witness namely Kalidas Gokaldas Patel at exh.113 and his deposition was recorded on 10th January, 1989. On that date, the real owner Kalidas Gokaldas Patel was not in a position to move from bed as he was bed-ridden. The plaintiffs have taken deposition of some other person in the name of Kalidas Gokaldas Patel and hence the plaintiff has obtained a decree by fraud and the execution application was required to be dismissed. It was also stated before the executing court that the petitioner has challenged the judgment of the trial court by filing Regular Civil suit no. 739 of 1996 for a declaration that the decree in civil suit no.212 of 1983 is unexecutable as it was obtained by committing fraud and that Regular Civil suit no.739 of 1996 is pending in the Court of 5th Civil Judge (S.D.), Ahmedabad (Rural). Hence, the petition was required to be dismissed with costs.

3. The executing court after going through the material on record, dismissed the objections raised by the petitioers and passed the execution order as stated above.

4. The contention of the learned counsel for the petitioner is that in view of the provisions of section 47 of the Civil Procedure Code and more particularly clause -1 of section 47, the executing court is bound to determine all questions arising between the parties to the suit relating to execution of the decree. Since the judgment debtors are prevented from filing a

separate suit pertaining to the question calling for determination of execution of a decree and since there is no alternative and efficacious remedy, save and except filing of the application raising objection to executability of the decree, the court is bound to give full opportunity including leading of evidence, if required, both oral as well as documentary and if he fails to do so, it will vitiate the impugned order as null and void. In view of the provisions of Order 21, Rule 9 read with Rules 101 and 103 of Civil Procedure Code, the court has to decide all questions including right, title and interest. It is also suggested that the executing court be directed to permit the petitioners to lead evidence in order to establish and prove that the decree is not executable in view of the subsequent development, namely coming into existence of the draft town planning scheme which would provide for allotment of final plot nos. instead of survey nos. which may be carved out either from the original survey nos. or some other numbers situated elsewhere. If new road is provided for approaching the land of the plaintiff, he would be entitled to file a suit. The executing court has considered the contentions raised before it. The decree has already been passed by the 4th Joint Civil Judge (S.D.), Ahmedabad and it is not a disputed fact and the position between the parties that appeared. The road passing from western side of survey no.1050 and northern side of survey no. 1043 is 8 ft. wide and there is a declaration in Regular Civil suit no. 212 of 1983 about 8 ft. wide road which is passing in between western side of survey no. 1050 and northern side of survey no. 1043. The petitioners-opponents had restrained by creating hurdles and obstacles in the cart-way of the present respondents. It has been declared by the court concerned that the opponent no.3/petitioner has constructed a well, hence it has been ordered to be removed by the court commissioner. So far as the draft of the town planning scheme is concerned, the executing court recorded a finding that the petitioners have not produced any material on record to show that the town planning scheme has already been implemented over the suit land. Even survey no. 1050 is divided into three parts. The wall is situated on the western side of survey no.1050 and that has been prayed to be removed by the respondents. Three divisions of survey no. 1050 do not make any difference whether these survey nos. were divided or not. One gate has also been installed by the petitioner and that was required to be removed.

So far as the contention of the petitioners that the decree was obtained by a fraud is

concerned, it was not accepted as the witness Kalidas Gokaldas was examined and his deposition is at exh.113 and his deposition did not appear to be a fraud document or deposition by some other person on oath before the court. The trial court has also considered that the petitioners have filed one suit no. 739 of 1996 challenging the present decree as null and void. The executing court found that it was immaterial that the petitioners have filed that suit and maintainability of such suit was also doubtful and no injunction was obtained by the petitioners against the execution of the present decree. Hence, the pendency of the suit cannot deprive the decree holder from enjoying fruits of the decree and the executing court found that no material has been produced to believe that the situation of the suit way has been changed.

5. I have considered the contentions of the learned counsel for the parties. This is a case in which Regular Civil Suit no. 212 of 1983 was filed and that suit was decreed on 29th February, 1992 by the trial court and First Appeal nos. 27 and 33 of 1992 were preferred against the judgment and decree passed by the trial court before the District Court and those appeals were dismissed. These petitioners filed Second Appeal nos. 14 and 86 of 1985. This Court did not find any substantial question of law. Hence, the said Second Appeal were dismissed by this Court on 8.3.1995 and 1.8.95 respectively. After the dismissal of the Second Appeals in the year 1995, execution application was filed on 18.9.95 and the impugned order was passed on 25th September, 1996. These petitioners have also filed Civil Suit no. 739 of 1996 for a declaration that the decree passed in Regular Civil Suit no. 212 of 1983 is a nullity, null and void as it is based on fraud committed by the respondents. It appears that after having failed in the execution proceedings, the petitioners-respondents filed Suit no. 739 of 1996 on the ground that the person namely Kalidas Gokaldas who was examined in the court was not the real previous owner of the land from whom survey number was purchased by the petitioner and some other person in place of Kalidas was examined and on the basis of that deposition, the decree has been passed. As the said decree is based on fraud committed by the respondents-plaintiffs and that decree is a nullity in the eye of law and cannot be executed.

6. The learned counsel for the petitioner placed relied on the decision of the Supreme Court in the casee of S.P. Chengalvarya Naidu (decd) by Lrs. vs. Jagannath (dead) by Lrs. and others reported in 1994(1)

SCC, 1 wherein it has been held that a fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party.

It is a well settled law that if fraud has been committed and on the basis of that fraud, some party obtains a decree, that decree would be a nullity. But in the present case, the circumstances appear otherwise. Firstly, some person named Kalidas was examined in the court who posed himself to be the previous owner of the survey numbers concerned and his deposition was recorded on oath in the open court where both the parties are expected to remain present and it cannot be said that after a long period of the dismissal of Second Appeals in this court, the petitioner found that the deposition was recorded on oath of a person who was a different person from real owner and the real owner was bed-ridden and he was not in a position to give his deposition on oath before the court at the relevant time. Secondly, the learned counsel for the respondents showed from the certified copy of the judgment of the lower appellate court dated 29.12.1994 wherein it is stated that it has been established by the evidence of the plaintiff as well as the evidence of the original owner of S.No.1042 i.e. Joitaram Khodidas and the evidence of one of the owner of S.No.1050 i.e. Kalidas Gokaldas, the plaintiffs have been able to establish that the way for going into his field is from S.No. 1050 and then from S No. 1043 as alleged. Thus, on the basis of the observations of the lower appellate court, the learned counsel for the respondents contended that the trial court has not based the judgment on the sole testimony of Kalidas but besides the evidence of Kalidas, two other persons were also examined and they have supported the evidence and it cannot be said that the decree was based on the sole testimony of Kalidas. Had it been so, then it could be a point for consideration that the decree was obtained on the basis of the fraud. However, it is not the case. But in the present case, three persons were examined and on the basis of the testimony of three witnesses, the court came to the conclusion that the petitioner has a right of way through the plots of the petitioners. Even the petitioners have filed a civil

suit for a declaration that the decree passed in the suit of the present respondents is a nullity. Filing of that suit does not itself render the decree a nullity unless it is proved in the suit itself that the decree was passed by committing fraud or producing some false evidence before the court. Moreover, the doubt created by the exdcution court regarding the maintanability of suit of 1996 does not appear to be unreasonable in view of the provisions of section 47 of the Civil Procedure Code. As such, the findings recorded by the executing court do not appear to be perverse at all in this regard. Furthermore, the petitioners have sought for an injunction in the suit filed by them in the year 1996 restraining the respondents in the execution proceedings. The learned counsel for the petitioners also contended that the judgment debtors are prevented from filing a separate suit pertaining to the question calling for determination of the execution of the decree. Still however, they have filed filed a civil suit which is pending in the trial court and in this respect, the learned advocate for the petitioner has relied on the judgment of this court in the case of Chandravati Co.Op. Housing Society Ltd., Maninagar vs. Bhairavnath Education and Cultural society Trust and others reported in 1993(1) GLR, 116. I have gone through the said authority cited by the learned counsel for the petitioner. But that authority is not applicable to the facts and circumstances of the present case as that authority relates to the objections raised by the third party. In the present case, the objections have been raised by the petitioner who was the defendant in the suit itself. The provisions of Order 21, Rule 97 read with Rules 101 and 103 of C.P.C. appear to be in connection with the objections raised by the third party wherein it can be said that the third party has right, title and interest over the property and the execution proceedings has nothing to do with the property concerned. As such, the authority cited by the learned counsel for the petitioner is not applicable to the facts of the present case. The learned counsel for the petitioner also relied on the judgment in the case ofM/s. Woolways, Shop-cum-office, Chandigarh and others vs. Central Bank of India reported in AIR 1990, Punjab and Haryana Bench, page 92 wherein it is held that it is obligatory on executing court to decide objection judicially and not summarily and if the parties wanted to lead evidence, they should be allowed to lead the evidence. In that case, an objection was filed that a decree has already been satisfied and hence the trial court was required to consider and decide the question regarding satisfaction of the decree. In the present

case, there is no question of satisfaction of the decree and hence that case is not applicable to the facts of the present case.

7. So far as the contention of the learned counsel for the petitioner that the decree cannot be executed in view of the changed circumstances in which the survey number has been divided into three parts and he relied on the decision of this Court in the case of Dhirajben Hariprasad, heirs and Lrs. of Late Hariprasad Joravarsinh vs. Harshadrai Chimanlal Thakkar and others reported in 1994(2) GLR, 1623 wherein it has been held that there can also be no dispute with regard to the proposition that once a decree is satisfied, it cannot be put to execution again. But the executing court to identify the property, possession which is to be delivered for the satisfaction of the decree, can hold a necessary enquiry. By doing so, the executing court would not incur any reproach that it is going behind the decree, under section 47 of the Code of Civil Procedure, all objections relating to the execution, satisfaction and discharge of a decree can be decided by the Court executing the decree and not by a separate suit. Therefore, the executing court was right in holding an enquiry to identify as to whether the open land in question is land appurtenant to the suit premises, i.e. the room.

8. In the present case, no doubt, survey no. 1050 has been divided into three parts by A, B and C, but it cannot be said that nature or shape of the land has been changed or situation has been changed. As such, at this stage, there is no question of determination of the identity of the place mentioned in the decree as that question has already been determined by the executing court.

9. On 17.2.2000, it was stated before this Court that the petitioners are making efforts to give an alternative way as passage to the owner of block no. 1042 within two months from the date of the order. Till today, the petitioners have not been able to settle the matter by providing an alternative cartway to the respondents.

10. The learned counsel for the petitioners submitted that Regular Civil Suit no. 739 of 1996 is pending in the trial cound and the findings recorded in this judgment will prejudice the suit proceedings. Hence, some observations may be made so that the trial court would be in a position to take an independent view

on the basis of the material and evidence on record. As such, the trial court is directed to decide Regular Civil Suit no. 739 of 1996 independently on the basis of the material on record and in accordance with law without being influenced by the observations made by this court in this judgment. The trial court is also directed to dispose of the suit as expeditiously as possible.

11. On considering the facts and circumstances of the case, I find no merit in these Revision Applications. Accordingly, the Revision Applications are dismissed with the above observations. Rule is discharged in each Revision Application. Interim relief stands vacated forthwith.

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